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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Section 73.202)

of the Commission's Rules)

Table of Allotments)

For FM Broadcast Stations)

(Danville and Nonesuch, KY))

MM Docket No. 01-169

RM-10145

To: Chief, Allocations Branch

REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE
SUPPLEMENTAL REPLY COMMENTS

Clear Channel Broadcasting Licenses, Inc. ("CCBL"), the licensee of WHIR-FM, Danville, Kentucky (the "Station"), hereby replies to the Opposition to Motion for Leave to File Supplemental Reply Comments (the "Opposition"), which was filed by LM Communications, Inc. ("LM") on November 16, 2001. ^{1/} The Opposition challenged the Motion for Leave to File Supplemental Reply Comments (the "Motion") that CCBL filed in order to ensure that the Commission has a complete and accurate record as to why it should adopt CCBL's proposal to bring a first local transmission service to Nonesuch, Kentucky (the "Proposal").

As detailed in the Motion, LM's first filing (the "LM Reply Comments") in this proceeding did not occur until the last day that reply comments could be filed, even though the LM Reply Comments largely addressed issues first raised in the CCBL's Petition for Rule Making (the "Petition") and the Commission's Notice of Proposed Rule Making in this

^{1/} LM's Opposition was filed pursuant to an extension request filed by LM. As CCBL recognizes the mail delivery difficulties of late, it is not opposing LM's request for additional time.

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proceeding (the “Notice”). Accordingly, as promptly as possible, CCBL filed Supplemental Reply Comments in Support of Proposal to Provide Nonesuch Its First Local Transmission Service (the “Supplemental Reply Comments”) in order to ensure that the Commission had all the facts necessary to make a determination in this proceeding. Put simply, the Opposition does not demonstrate any reason for the Commission to deny either the acceptance of CCBL’s Supplemental Reply Comments or the Proposal.

The Allocations Branch Has Accepted Supplemental Reply Comments In Similar Cases

The Allocations Branch has generally accepted supplemental reply comments when necessary to enable the resolution of a matter upon a more complete and accurate record. ^{2/} Other bureaus have similarly accepted late-filed comments, especially when a party filed its submission in such a way as to deprive the movant of a real chance to respond. ^{3/}

For example, and most directly relevant to this case, is the decision of the Allocations Branch in *Cal-Nev-Ari, Nevada*. ^{4/} In that case, the Allocations Branch overruled its previous decision not to consider supplemental reply comments. In *Cal-Nev-Ari*, the petitioner filed a Petition for Leave to file Supplemental Reply Comments, arguing that another party failed

^{2/} See e.g., *Indian Springs, Nevada*, Revised Report & Order, 14 FCC Rcd 10568, 10569 n5 (Allocations, 1999) (“We will accept KHWY’s [further comments] in order to resolve this case upon a complete and accurate record.”).

^{3/} See, e.g., *World Satellite Network, Inc. v. Tele-Communications, Inc.*, Memorandum Opinion & Order, 14 FCC Rcd 13242, 13243-44 n.11 (Cable Services, 1999) (considering Joint Surreply because opposing party “did little more than outline its argument in its program access complaint and only later provided specific factual allegations in its reply pleading”).

^{4/} *Cal-Nev-Ari, Nevada*, Memorandum Opinion & Order, 14 FCC Rcd 17153 (Allocations, 1999), *overruling* 10 FCC Rcd 7717 (Allocations, 1995). At issue in that case was whether Cal-Nev-Ari – a desert town of 350 with no local government – constituted a community for allotment purposes. Upon review, the Allocations Branch concluded that Cal-Nev-Ari satisfied the essentials required to establish the existence of a community. See *Cal-Nev-Ari, Nevada*, 14 FCC Rcd at 17157 (¶ 9).

to file comments opposing the petitioner's proposal until the reply comment round. As the petitioner had effectively been precluded from responding to the issues raised in the opposition, it argued that its supplemental reply comments should be accepted or the opposing reply comments stricken. Initially, the Allocations Branch did not strike the reply comments or accept the supplemental reply comments. ^{5/} However, upon further review, the Allocations Branch concluded that it should accept the supplemental reply comments lest the petitioner be "precluded from responding to the arguments against [the] proposal that were made for the first time in [the] Reply Comments."^{6/} Thus, confronted with a set of relevant facts nearly identical to those of the instant case, the Allocations Branch permitted the filing of late-filed supplemental reply comments to provide an avenue of response to a petitioner. Accordingly, under *Cal-Nev-Ari*, the Allocations Branch should permit the filing of the Supplemental Reply Comments here in order to allow CCBL an opportunity to respond, in the first instance, to the LM Reply Comments.

Moreover, LM's reliance on *Rosendale* is misplaced. ^{7/} In that case, the Allocations Branch did not entertain supplemental reply comments based on their lack of decisional significance. However, by decisional significance, the Allocations Branch meant that, because the parties' original counterproposals were defective, the supplemental reply comments could not possibly add anything that would affect the outcome of the proceeding. ^{8/} *Rosendale*

^{5/} *Cal-Nev-Ari, Nevada*, 10 FCC Rcd at 7717 n. 3.

^{6/} *Cal-Nev-Ari, Nevada*, 14 FCC Rcd at 17155 n. 11.

^{7/} *Rosendale, New York*, Report & Order, 10 FCC Rcd 11471 (Allocations, 1995).

^{8/} In *Rosendale*, three parties filed supplemental reply comments. The Allocations Branch found one counterproposal defective because it was not served properly on the opposing party, while another counterproposal was defective because it sought to modify a non-adjacent channel that was not mutually exclusive. Finally, the third supplemental reply comments, those of the

is distinguished from the instant case where CCBL's Proposal is technically and procedurally sound, and where it is the Supplemental Reply Comments include information relevant to the outcome of this proceeding.

Finally, LM contends that the Supplemental Reply Comments do not provide any additional pertinent information in response to LM's Reply Comments. This is clearly erroneous. In addition to pointing out LM's mischaracterization of relevant Commission precedent, the Supplemental Reply Comments include substantial information responsive to LM's allegations or incorrect assertions. ^{9/}

Accordingly, under Commission precedent, the Motion should be granted and the Supplemental Reply Comments accepted. First, review of the Supplemental Reply Comments will afford CCBL an opportunity to respond, for the first time, to LM's Reply Comments, filed on the last day of the reply comment period. Second, review of the Supplemental Reply Comments will enable the Allocations Branch "to resolve this case on a complete and accurate record." ^{10/}

LM's Substantive Response Also Provides No Basis For Denying the Proposal

As to the substance of the Opposition, LM continues to miss the real issue. Under Commission precedent, it is not necessary for a locality to demonstrate all the indicia of a community to qualify as a community. If a proponent can show that a locality has a year-round population (in a commonly accepted geographic location), identify businesses with a nexus to the

petitioner, were rendered moot because they only responded to the other supplemental reply comments. *See Rosendale, New York*, 10 FCC Rcd at 11471 n.1.

^{9/} *See* CCBL Supplemental Reply Comments at 3-9.

^{10/} *See Indian Springs, Nevada*, 14 FCC Rcd at 10569 n5.

locality, and present either an objective demonstration or a subjective affirmation of the locality's own sense of community, that locality is a community for allotment purposes.

CCBL has more than made this showing. There is no dispute that Nonesuch has a year-round population. There is also no real dispute that Nonesuch has a commonly accepted geographic location: sources from the nationally distributed *2001 MapQuest Road Atlas* 11/ to the Woodford County Chamber of Commerce's own materials confirm that the community of Nonesuch is centered on the intersection of Fords Mill and Cummins Ferry Roads. Nor can there be any argument as to whether local businesses demonstrate a nexus with Nonesuch in light of both the Chamber of Commerce's statement attesting to that fact, and the many objective indications, in the businesses' names and advertising, that they view themselves as part of Nonesuch. 12/

Finally, there can be no reasonable challenge to Nonesuch's own sense of community. As for subjective evidence, CCBL has presented more than a dozen affirmations by Nonesuch residents that the community both exists and perceives itself as a community distinct from the relatively distant Versailles. 13/ LM has presented one – and that from a person who

11/ See Attachment 1 (including page from most recent *MapQuest Road Atlas* (2001 edition) showing the commonly accepted location of Nonesuch).

12/ That LM attempts to challenge the very existence of the Nunsuch Grocery by relying on the Chamber of Commerce's directory is ridiculous. There can be many reasons why the grocery – like other local businesses – does not appear in this listing. But there can be no doubt that the grocery exists. First, CCBL has submitted photographs of the Nunsuch Grocery in its Comments. See CCBL Comments at Exhibit 7. Second, the Chamber of Commerce's own statement confirms the grocery's existence *by name*. See CCBL Comments at Exhibit 6.

13/ This declatory evidence need not even include two of the declarations challenged by LM – Mary Paul's, whose declaration lacks an address, or Minnie Bannister's, for reasons explained below. As for the affirmations of two residents that LM attempts to claim live outside of Nonesuch, CCBL respectfully suggests that the Commission credit the residents' statements as to where they live more than LM's assertions. See Attachment 2 (demonstrating that JR's Fat Farm, which one signatory noted as co-located with her residence, is located in Nonesuch, Kentucky).

admits that he just moved into the area (and thus may not be aware of Nonesuch's own separate sense of community). ^{14/} And while LM has submitted evidence as to only three other Woodford County residents who do not perceive Nonesuch as a separate community, CCBL has presented the signatures and addresses of *fifty* persons, including the president of the county's Chamber of Commerce, who do not reside in Nonesuch but who confirm that Nonesuch is a widely recognized community distinct from Versailles.

As for objective evidence, CCBL has named several entities that reference Nonesuch in their names or advertising – which is itself sufficient objective evidence of Nonesuch's distinctiveness; LM has offered no alternative explanations for such references. (In contrast, when LM asserted that a distinct mailing address is necessary for community status, CCBL has presented recent Commission precedent to the contrary.) And when LM continues to assert that Nonesuch is but a neighborhood on the outskirts of Versailles, CCBL identified several independent sources – including local and national publications – that clearly show that Versailles, a relatively small community of less than 8,000 persons, lies at least 10 miles from the heart of Nonesuch.

Accordingly, Nonesuch clearly is an identifiable population grouping, and is thus a community deserving its own local transmission service. The Commission should act promptly to grant the proposed reallocation of WHIR-FM, which would enable CCBL to bring a first local transmission service to Nonesuch.

^{14/} CCBL agrees with LM on one point – that the statements of Minnie Bannister provided by CCBL and LM respectively ought not to be credited because they are self-contradictory.

CONCLUSION

For the reasons set forth by CCBL in this proceeding, CCBL respectfully asks that the Commission provide the relief requested and promptly adopt the Proposal.

Respectfully submitted,

**CLEAR CHANNEL BROADCASTING
LICENSES, INC.**

By: _____

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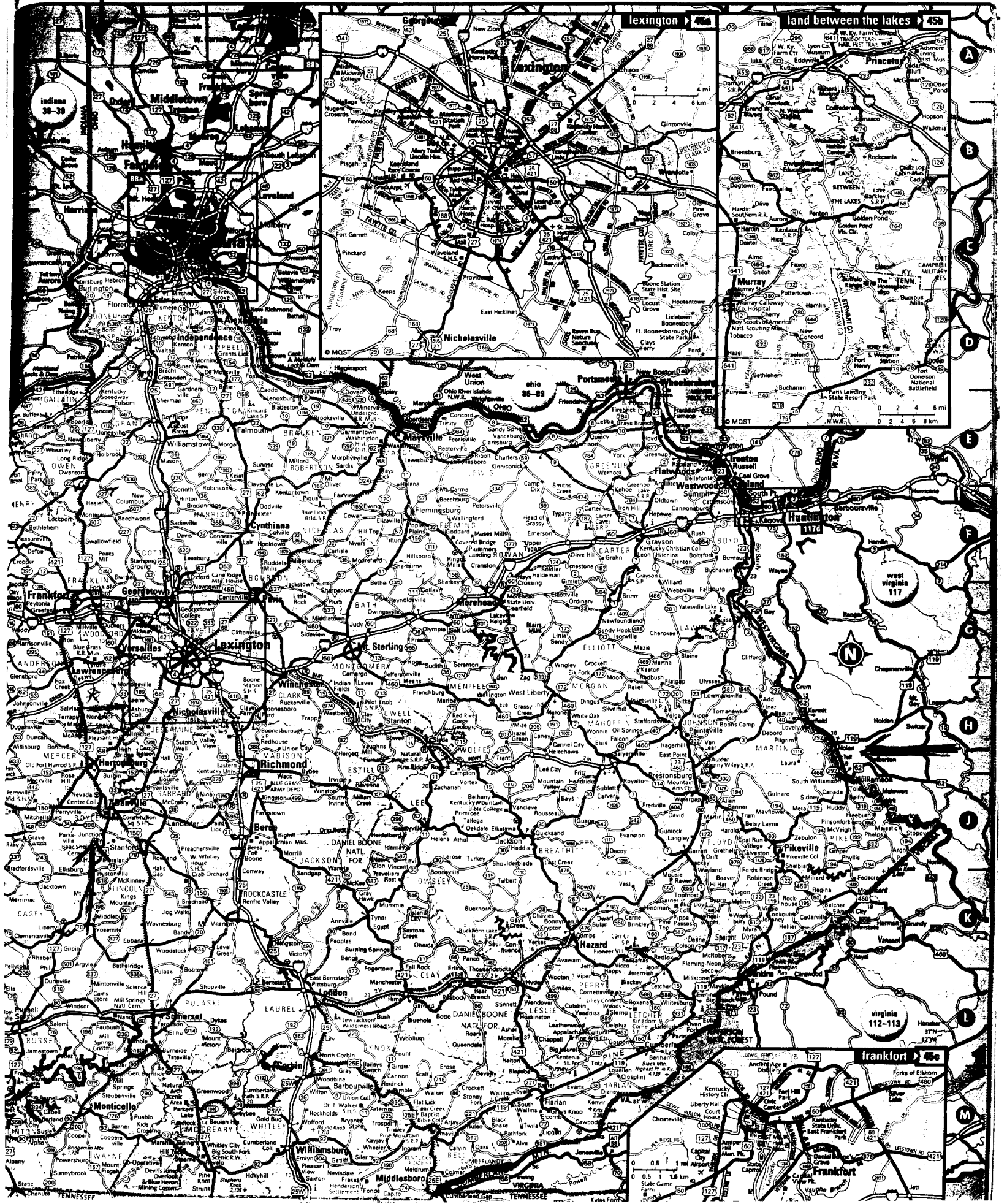
November 28, 2001

ATTACHMENT 1

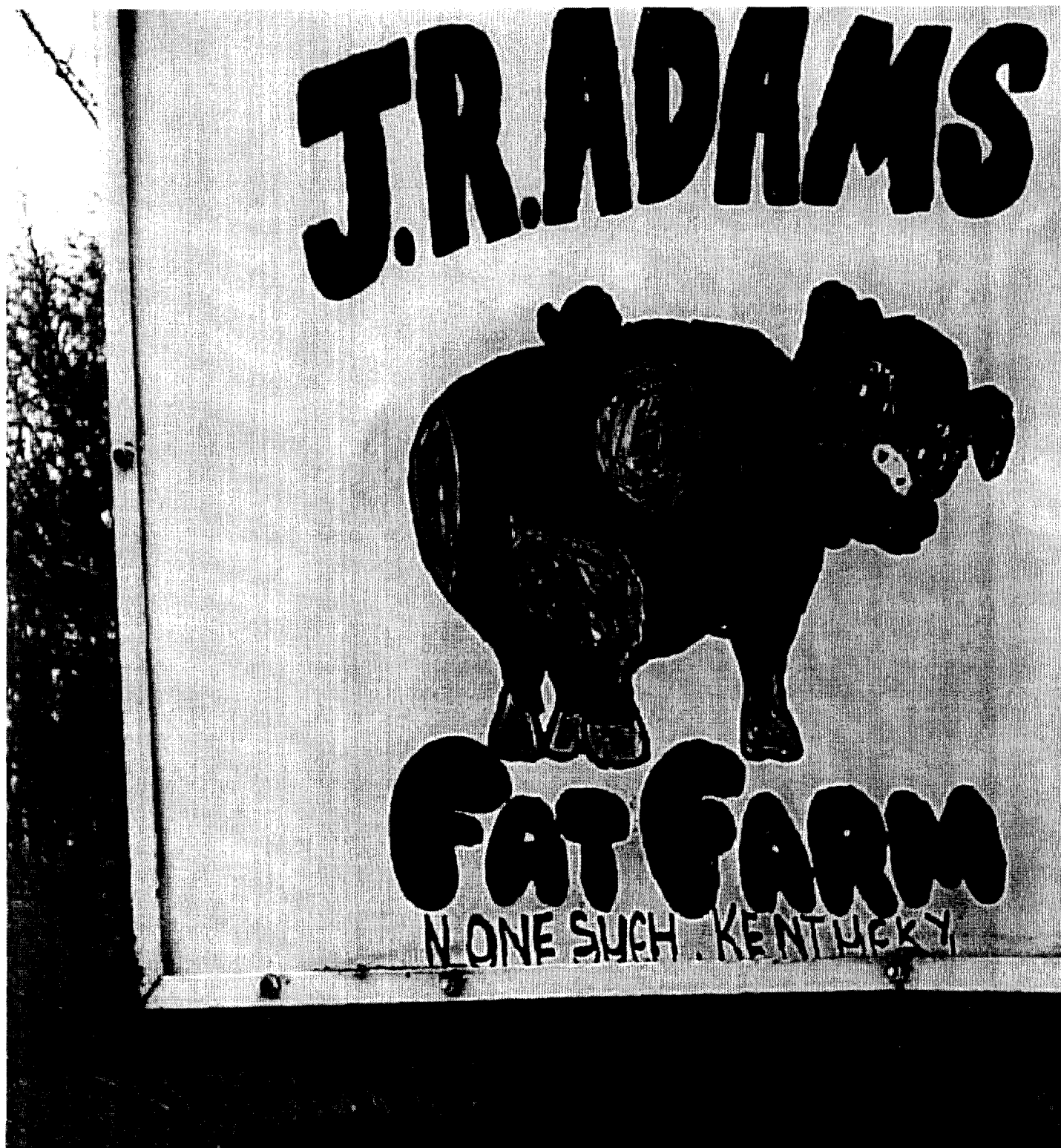
kentucky

DRIVING DISTANCES IN MILES

	ASHLAND	BOWLING GREEN	CHATTANOOGA	CLARKSVILLE	CLAYTON	COVINGTON	ELIZABETH	FRANKFORT	HARRISBURG	HENDERSON	HOPKINSVILLE	LEXINGTON	LOUISVILLE	MADEIRA	MAKESFIELD	NEWARK	OWENSBORO	PADUCAH	REIDSVILLE
BOWLING GREEN	274	72	70	161	26	200	107	63	157	145	112	146	222	203	76	135	265		
LEXINGTON	119	157	85	89	29	138	120	207	35	77	80	273	67	136	183	262	142		
LOUISVILLE	194	112	100	44	54	92	194	123	170	80	156		228	141	214	109	217	277	
OWENSBORO	100	76	306	95	161	171	275	30	80	183	221	109	138	248	279		127	323	
PADUCAH	79	135	317	175	266	173	397	121	72	262	283	217	24	327	373	127		402	



ATTACHMENT 2



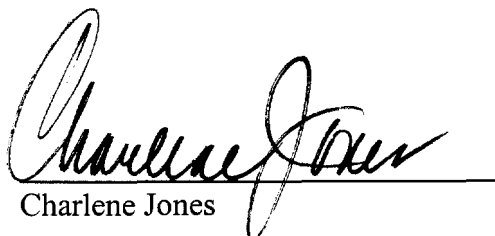
CERTIFICATE OF SERVICE

I, Charlene Jones, hereby certify that on this 28th day of November, 2001, a copy of the foregoing Reply to the Opposition to the Motion to File Supplemental Reply Comments was sent by first-class mail, postage prepaid, to:

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